NOTE

Chinks in the Armor: Municipal Authority to Enact Shoreline Permit Moratoria After *Biggers v. City of Bainbridge Island*

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I. INTRODUCTION

In 2001, the city of Bainbridge Island, Washington, faced a problem not uncommon to cities with valuable shorefront real estate. On the one hand, homeowners and developers desired to build and improve on shoreline lots. On the other, members of the community concerned about the proposed construction of overwater structures in relatively pristine areas pressured the city to block more development. When scientific study revealed that certain portions of the city's shorelines were in fact vital salmonid habitat,[1] the city council adapted its policies to preserve and protect these ecological resources.[2] Before beginning the change in earnest, the city enacted a permit moratorium to prevent frustration of its

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1. *See* Bainbridge Island, Wash., Ordinance 2001-45 (Oct. 10, 2001). In the 2002 moratorium, the city council renewed its findings of facts concerning the threats to salmonid habitat. Bainbridge Island, Wash., Ordinance 2002-29 (Aug. 14, 2002).

2. Specifically, the city decided to change provisions of its shoreline master plan. *See* discussion *infra* Part III.A.

efforts by new development.[3] By refusing to accept permit applications, the city bought itself time to plan for new rules regarding the building of new overwater structures and new shoreline armoring.[4]

Not surprisingly, shoreland homeowners and certain local business interests were not excited about the new policy.[5] Because any substantial development on the shorelines required securing a permit from the city under the Shoreline Management Act of 1971 ("SMA"),[6] the moratorium barred both homeowners from improving their property and builders from pursuing their livelihood in shoreline areas.[7] These offended residents and business owners sued, seeking declaratory relief in the form of an invalidation of the moratorium as enacted.[8] They succeeded initially as the trial court granted summary judgment in their favor on the question of the moratorium's validity.[9] The Court of Appeals of Washington, Division Two, affirmed the invalidation of the moratorium.[10] This litigation and its resulting effects are the primary focus of this Note.

Why would a relatively mundane dispute over what amounts to a few cubic yards of concrete warrant the extensive discussion encompassed in this Note? This dispute gives rise to a fundamental question about power: What is the scope of municipal power under one of Washington's most important environmental protection laws? Additionally, questions arise about competing normative values within environmental protection, property rights, and responsible land use and development. Placed against a backdrop of growing contentiousness surrounding these issues in Washington politics, the relevance and timeliness of these questions cannot be doubted.

The identity of other interested parties in this case should not go without comment. On one side are the plaintiff respondents, who are

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3. Bainbridge Island, Wash., Ordinance 2001-45 (Oct. 10, 2001); City of Bainbridge Island's Opening Brief at 4–5, Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 103 P.3d 244 (2004) (No. 30752-9-II), 2003 WL 24313126.

4. "Shoreline armoring" is a term of art denoting bulkheads, seawalls, revetments, groins, or other protective structures designed to prevent erosion. City of Bainbridge Island's Opening Brief at 5, Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 103 P.3d 244 (2004) (No. 30752-9-II), 2003 WL 24313126.

5. Response Brief at 1, Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 103 P.3d 244 (2004) (No. 30752-9-II), 2004 WL 3775337.

6. WASH. REV. CODE § 90.58.140(2) (2006) ("A substantial development shall not be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under [the Act].").

7. Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 864, 103 P.3d 244, 247 (2004).

8. *Id.* at 862, 103 P.3d at 245–46.

9. *Id.*

10. *Id.* at 868, 103 P.3d at 249.

private property owners, joined by local construction industry interests.[11] On the other side is a small municipality. As the case moved towards the Washington Supreme Court, each side's list of friends grew. The Building Industry Association of Washington, Washington Association of Realtors, and Pacific Legal Foundation filed amicus briefs on behalf of the property owners. Washington Environmental Council, Futurewise, People for Puget Sound, various state agencies,[12] and Snohomish County filed amicus briefs on behalf of the city. With a few exceptions, these parties represent the participants in the cacophonous meta-debate over private property rights and environmental protection in Washington. Indeed, *Biggers v. City of Bainbridge Island* marks yet another round in that ongoing contest.[13]

Prior to *Biggers*, the existence of municipal power to use moratoria was not always certain under Washington law. While it was settled law under various land use planning statutes, including the Planning Commissions Act, Planning Enabling Act, and Growth Management Act ("GMA"), that municipalities had the power to enact moratoria, the question of whether municipalities could enact permit moratoria specifically under the SMA remained unanswered.

The court of appeals reached an unfortunate and incorrect result in *Biggers*, and the Washington Supreme Court—or, should it fail, the state legislature—should take immediate steps to remedy the situation. The *Biggers* court's holding ignores precedent regarding state constitutional law, creates a trap for municipalities with shorelines inside their jurisdictional boundaries that simultaneously plan under the GMA or the Optional Municipal Code ("the Code"), and risks malignant practical problems. Further, the court misinterprets the fundamental structure of Washington law pertaining to municipal power over land use planning and, by adhering to strict textualism in interpreting the SMA, also misinterprets the legislative intent behind the SMA.

A rule that allows for permit moratoria in one part of a municipality's jurisdiction but not in another—namely, its shorelines—creates an irrational incongruity in land use planning and regulation. After *Biggers*, municipalities with shorelines in their jurisdiction may employ moratoria to preserve the status quo while altering their master plans over every

11. The joined parties were Sealevel Bulkhead Builders and Home Builders Association of Kitsap County. *See Biggers*, 124 Wash. App. 858.

12. These agencies were the Washington State Department of Ecology and the Washington State Department of Community, Trade, and Economic Development; the latter is the state agency charged with administering the Growth Management Act.

13. It is not the focus of this Note to review the entire scope of the debate about land use regulation in Washington; rather, it is only to call attention to this litigation, as yet another "battle" in an ongoing "war" over property rights and environmental protection.

part of their physical jurisdiction, except for a 200-foot-wide strip of land along the shoreline above the ordinary high water mark.[14]

The court's holding also risks significant practical problems that undercut effective land use planning. First, with no power to enact moratoria to preserve the status quo on its shorelines, Washington's vested-rights doctrine[15] would allow for end runs around new shoreline regulations and lead to piecemeal shoreline development—effectively contravening the purposes of the SMA.[16] Second, due to the predictable influx of permit applications after notice of pending changes to a shoreline master plan is given, municipalities have an incentive to proceed hastily,[17] giving short shrift to scientific findings, drafting poorly, or potentially violating due process—all of which could lead to costly and unnecessary litigation. Finally, a municipality may choose to work backward by enacting a draconian shoreline master plan and subsequently amend the plan to loosen regulations over time. Under this approach, municipalities risk a statutory violation, or even a determination of unreasonable use of the police power, which may constitute a regulatory taking.[18]

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14. WASH. REV. CODE § 90.58.030(2)(f) (2006). The term "ordinary high water mark" has a technical definition in Washington:

> [It is] that mark that will be found by examining the bed and banks and ascertaining where the presence and action of waters are so common and usual, and so long continued in all ordinary years, as to mark upon the soil a character distinct from that of the abutting upland, in respect to vegetation as that condition exists on June 1, 1971, as it may naturally change thereafter, or as it may change thereafter in accordance with permits issued by a local government or the department.

WASH. ADMIN. CODE 173-22-030(11) (2006). In its more general terms, this boundary line has been used since the time of Justinian to mark the line separating what is public domain and private property, *see* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 360 (N.J. 1984), and is enunciated within the Washington Constitution. *See* WASH. CONST. art. XVII, § 1. All land shoreward from the ordinary high water mark is subject to the public easement. The legislature used this boundary line to define the regulatory jurisdiction of the SMA. The SMA thus regulates land use from the ordinary high water mark to 200 feet shoreward from that point. *See* WASH. REV. CODE § 90.58.030(2)(f) (2006).

15. The vested-rights doctrine holds that submission of a permit compliant with current regulations (usually a permit to develop land) vests a property right in that particular use. *See* discussion *infra* Part II.B.1 and accompanying footnotes.

16. *See* WASH. REV. CODE § 90.58.020 ("There is, therefor[e], a clear and urgent demand for a planned, rational, and concerted effort . . . to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines."); *see also* discussion *infra* Part II.A.4.

17. *See* Amicus Curiae Brief of Snohomish County at 18, Biggers v. City of Bainbridge Island, 156 Wash. 2d 1005, 132 P.3d 146 (2006) (No. 77150-2), 2006 WL 937647.

18. A regulatory taking occurs when a regulation imposes such a loss in value in property that it amounts to a taking under the Fifth Amendment and necessitates compensation. Justice Holmes first elucidated the concept in *Pennsylvania Coal Co. v. Mahon*, when he stated that "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. 393, 415 (1922). Modern courts determine whether a taking has occurred by balancing the interests of a property owner in his or her investment-backed expectations for the parcel against the interests of the public in the regulation of public safety, health,

A holding that municipalities do have the power to enact permit moratoria without exceeding their authority under the SMA is both warranted and legally defensible. Part II first contains an examination of the sometimes overlapping land use codes under which cities like Bainbridge Island plan. Second, the Part discusses grants of authority to enact moratoria in other land use planning statutes. Part III then provides a synopsis of *Biggers* and the court's holding, along with an analysis of both the legal and practical problems with the court's decision, as well as reaction to the case in another jurisdiction. In Part IV, three solutions to the legal problems before the Washington Supreme Court are presented. The strengths and weaknesses of two arguments presently before the court will be evaluated; Part IV subsequently proposes a solution to the issue not presently being argued.

II. THE INTRICATE WEB: LAND USE REGULATION IN WASHINGTON

Bainbridge Island, like countless cities and towns in Washington, plans under a set of laws that often overlap. An intricate web of land use codes, environmental protection statutes, constitutional provisions and related doctrine, and local ordinances guide and bind local governments. For the purposes of this Note, only the parts of the web relevant to the dispute in *Biggers* will be discussed: the Washington Constitution's police power provision, the GMA, the Code, and the SMA.

A. Municipal Planning Authority in Washington

Municipal land use planning authority in Washington derives from multiple sources, ranging from the general delegation of police power in the state constitution to specific statutes detailing both the substance and process of planning. In addition, other natural features of municipalities' physical jurisdiction, such as shorelines, are managed by statute. Before delving into the question of whether the SMA is substantively different in its grant or restriction of municipal power, an exploration of the varied

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and welfare. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 125 (1978). The *Penn Central* Court noted that a taking may more readily be found when the interference of the property can be characterized as a physical invasion by government. *Id.* at 128 (citing United States v. Causby, 328 U.S. 256 (1946)). In the watershed case of *Lucas v. South Carolina Coastal Council*, the Court clarified "the physical invasion" exception to the *Penn Central* balancing test and held that regulation depriving land of all economically beneficial use is a "total taking" not requiring a case-specific inquiry into the public interest advanced by the regulation in question. 505 U.S. 1003, 1015 (1992); *accord* Guimont v. Clarke, 121 Wash. 2d 586, 854 P.2d 1 (1993) (importing the *Lucas* rule into Washington's takings jurisprudence). In addition to pure regulatory takings analysis, Washington courts apply substantive due process analysis in order to protect fundamental property rights. Presbytery of Seattle v. King County, 114 Wash. 2d 320, 329, 787 P.2d 907, 912 (1990). *See generally* Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. L. REV. 495, 513 (2000).

statutes, case law, and doctrines governing municipal power over land use planning in Washington will prove useful.

1. Constitutional Authority to Regulate Land Use

Municipalities in Washington, as part of a generalized grant of police power under the Washington Constitution,[19] have the authority to enact land use plans "unfettered by any enabling act."[20] In Washington, the delegated police power is extensive, though not plenary.[21] Recently, the Washington Supreme Court revisited the question of the extent of municipal police power in *Weden v. San Juan County*.[22] Owners and operators of personal watercraft brought an action against the county challenging the validity of an ordinance issued by the county that banned the use of personal watercraft on all marine waters of San Juan County, subject to a few exceptions not germane to this discussion.[23] The court noted that the police power is firmly rooted in the history of this state and that municipal police power extends as far as state police power when the subject matter of the ordinance is local and does not conflict with the general laws.[24] Enunciating a three-part test, the court continued its longstanding deferential treatment of local ordinances enacted under the police power clause:[25] "We will find the Ordinance consistent with article XI, section 11 of the state constitution unless: (1) the Ordinance conflicts with some general law; (2) the Ordinance is not a reasonable exercise of the County's police power; or (3) the subject matter is not local."[26]

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19. WASH. CONST. art. XI, § 11 ("Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.").

20. RICHARD L. SETTLE, WASHINGTON LAND USE AND ENVIRONMENTAL LAW AND PRACTICE § 1.3 (1983).

21. *See* discussion *infra* Part IV.B and notes 181, 183.

22. 135 Wash. 2d 678, 958 P.2d 273 (1998).

23. *Id.* at 684, 958 P.2d at 276.

24. *Id.* at 692, 958 P.2d at 280 (quoting Covell v. City of Seattle, 127 Wash. 2d 874, 878, 905 P.2d 324, 326 (1995)).

25. Indeed, Washington's municipalities have historically been entitled to deference when enacting legislation under the police power. *See* Hass v. City of Kirkland, 78 Wash. 2d 929, 932, 481 P.2d 9, 11 (1971) ("[Article XI, section 11] is a direct delegation of the police power as ample within the limits as that possessed by the legislature itself. It requires no legislative sanction for its exercise so long as the subject matter is local, and the regulation reasonable and consistent with the general laws.") (quoting Detamore v. Hindley, 83 Wash. 322, 326, 145 P. 462, 463 (1915)). *But see infra* Part IV.B and notes 181, 183.

26. *Weden*, 135 Wash. 2d at 692, 958 P.2d at 280. This three-part test is perhaps best described as a limitation of the so-called "home rule" doctrine. Home rule is another term for local sovereignty. The Washington Supreme Court has recognized that cities have the power to "determine for themselves, and in their own way, the many important and complex questions of local policy which arise . . . ." Hilzinger v. Gillman, 56 Wash. 228, 234, 105 P. 471, 474 (1909).

2. The Growth Management Act

The GMA was conceived as a statewide solution to land use planning, an area of regulation typically performed by local governments.[27] The GMA mandates a system of comprehensive land use planning by local governments throughout the state.[28] Within the GMA, the legislature enumerated thirteen goals to be advanced by the development and implementation of comprehensive plans.[29] These purposes range from the promotion of urban growth, the protection of the environment, and the reduction of sprawl, to the maintenance and enhancement of natural resource industries and the protection of private property rights.[30]

While counties and municipalities perform the actual planning under the GMA, the legislature has developed common features that must be present in each plan.[31] These planning requirements include the protection of critical areas,[32] siting of essential public facilities,[33] and concurrent development of transportation to accommodate new growth.[34]

The city of Bainbridge Island plans under the GMA.[35] As a city located within Kitsap County, which is a county that must plan under the GMA, the city is also bound by the strictures of the Act.[36] Its first comprehensive plan was developed in 1994, and the plan was subsequently updated in 2004.[37] As explained below, the GMA also grants municipalities planning thereunder the authority to enact moratoria.[38]

3. The Optional Municipal Code

Land use in Bainbridge Island is also governed in part by the Code.[39] Enacted in 1967, the Code is a strict, but optional, statutory

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27. *See* G. Richard Hill & Angela Luera, *Overview of Washington Growth Management Act, in* WASHINGTON GROWTH MANAGEMENT ACT A-2, A-2 (Wash. Law Sch. Found. ed., 1992).

28. *Id.* at A-3. Not all cities and counties must plan under the GMA. The GMA sets out specific parameters that specify which local governments must plan. WASH. REV. CODE § 36.70A.040 (2006).

29. WASH. REV. CODE § 36.70A.020 (2006).

30. *Id.*

31. WASH. REV. CODE § 36.70A.070 (2006); Hill & Luera, *supra* note 27, at A-4.

32. WASH. REV. CODE § 36.70A.060(2) (2006); Hill & Luera, *supra* note 27, at A-5 to -6.

33. WASH. REV. CODE § 36.70A.060(3) (2006); Hill & Luera, *supra* note 27, at A-5 to -6.

34. WASH. REV. CODE § 36.70A.060(6)(a)(iii)(A)–(F) (2006); Hill & Luera, *supra* note 27, at A-5 to -6.

35. *See* City of Bainbridge Island, About Island Government, http://www.ci.bainbridge-isl.wa.us/default.asp?ID=348 (last visited Jul. 22, 2007).

36. *See* WASH. REV. CODE § 36.70A.040(1) (2006).

37. *Id.*

38. *Id.* § 36.70A.390; *see* discussion *infra* Part II.B.2.

39. *See* City of Bainbridge Island, About Island Government, *supra* note 35.

framework of municipal power.[40] If a city does not wish to develop its own set of municipal regulations, it may elect to opt in to the Code's provisions,[41] becoming what is called a "code city."[42] The Code splits municipalities into two categories: charter and noncharter.[43]

Code cities retain some measure of autonomous authority under the Code. Specifically, the legislature inserted the following statement of purpose into it: "The general grant of municipal power conferred in this chapter and this title . . . is intended to confer the greatest power of local self-government consistent with the constitution of this state and shall be construed liberally."[44] Conferral of power to local governments in this manner is consistent with Washington's home-rule doctrine.[45]

The Code contains provisions to guide the land use planning and zoning process for Code cities.[46] To that end, it provides statutory authority to Code cities to enact moratoria, subject to some procedural constraints.[47] The city of Bainbridge Island relied in part upon the Code in order to validate its moratorium ordinance. As explained below, this argument failed.[48]

4. The Shoreline Management Act

Primarily, the SMA embodies the legislature's response to a "clear and urgent demand for a planned, rational, and concerted effort . . . to prevent harm in an uncoordinated and piecemeal development of the state's shorelines."[49] The SMA became law in 1971, following a significant court decision, known as *Lake Chelan*,[50] and public demands for

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40. WASH. REV. CODE § 35A.01.010 (2006). The Code provides an alternative to the basic statutory classification system of municipal government. *See id.* It was designed to provide broad statutory home rule authority in matters of local concern. *See id.* Any unincorporated area having a population of at least 1500 may incorporate as a "code city," and any city or town may reorganize as a code city. Code cities with populations over 10,000 may also adopt a charter. SETTLE, *supra* note 20, at § 1.4.

41. WASH. REV. CODE §§ 35A.02.010–.140 (2006).

42. *Id.* § 35A.01.035.

43. *See id.* § 35A.01.010. Bainbridge Island does not have a charter and is thus called a noncharter code city. City of Bainbridge Island, About Island Government, *supra* note 35.

44. WASH. REV. CODE § 35A.11.050 (2006).

45. *See* discussion *supra* note 26.

46. *See* WASH. REV. CODE §§ 35A.63.010–280 (2006).

47. *Id.* § 35A.63.220; *see also* discussion *infra* Part II.B.2.

48. *See* discussion *infra* Part III.B.

49. WASH. REV. CODE § 90.58.020 (2006).

50. Wilbour v. Gallagher (Lake Chelan), 77 Wash. 2d 306, 462 P.2d 232 (1969). For more on the *Lake Chelan* decision, see Charles E. Corker, *Thou Shall Not Fill Public Waters without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 65 (1969); Edward A. Rauscher, *The Lake Chelan Case—Another View*, 45 WASH. L. REV. 523 (1970); and Geoffrey Crooks, *The Washington Shoreline Management Act of 1971*, 49 WASH. L. REV. 423, 425 (1974).

legislative response.[51] Structurally, the SMA divides jurisdiction between the municipalities and the Washington State Department of Ecology ("Ecology"). Municipalities initiate and administer the program,[52] while Ecology supervises and reviews shoreline plans pursuant to its authority under the Act.[53]

Prior attempts at legislating development management on the State's shorelines met with failure, but after *Lake Chelan*, legislative progress took the form of an alternative to the citizen's initiative.[54] The SMA was submitted to the people, along with the citizen's initiative, and the SMA prevailed in the 1972 general election.[55] That the choice was made in this fashion might reflect a longstanding commitment to the primacy of local decision making in local matters. This focus on local control of planning decisions is not an anomaly in Washington governance, as has been demonstrated by the review of the other planning statutes in place.[56]

For the purposes of the discussion in this Note, the salient difference between the legislature's alternative measure and the citizen's initiative is the source of power over shoreline management decisions. In the SMA, primary planning and administrative responsibility rests in the hands of local governments, while under the citizen's initiative, such responsibility would have been held by Ecology.[57] While Ecology shares power with local governments under the SMA,[58] that authority is limited to disapproval of shoreline master programs and suggested modifications.[59] The scope and importance of local control under the SMA indicates that the legislature intended municipalities to retain at least some autonomy to regulate their shorelines. After *Biggers*, that autonomy seems considerably constrained.[60]

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51. Crooks, *supra* note 50, at 424.

52. SETTLE, *supra* note 20, § 4.1 (citing WASH. REV. CODE § 90.58.050 (1982)).

53. *Id.* (citing WASH. REV. CODE § 90.58.080(2) (1982)).

54. Crooks, *supra* note 50, at 424.

55. *Id.*

56. *See* discussion *supra* Part II.A.1–3. Recall that article XI, section 10 of the Washington Constitution is another example of the State's emphasis on local control. It establishes that any city with a population of 20,000 or more has the authority to frame a charter for its own government, subject to the constitution and laws of the state. Michael Sebree, Comment, *One Century of Constitutional Home Rule: A Progress Report?*, 64 WASH. L. REV. 155, 159 (1989) (citing WASH. CONST. art. XI, § 10).

57. Crooks, *supra* note 50, at 424.

58. WASH. REV. CODE § 90.58.050 (2006).

59. *Id.*

60. *See* discussion *infra* Part III.B.

As a planning and management scheme, the SMA is procedurally similar to the other land use planning statutes in Washington.[61] Under the SMA, affected municipalities must create and maintain a shoreline master plan,[62] evaluate permit applications for consistency with the plan,[63] and issue development permits for conforming uses.[64] This procedure is akin to what is required of municipalities under the GMA and other zoning and planning statutes.

One central difference between the SMA and other land use planning acts is the uniform level of authority conferred to municipalities under the act. Washington—like several other states—classifies municipalities and tailors the scope of their land use planning authority according to their population size, so that smaller localities have less planning power than larger ones.[65] Under the SMA, however, all local governments are given the same level of responsibility provided that there are "shorelines of the state" within their jurisdictional boundaries.[66] The city of Bainbridge Island is surrounded by shorelines and is thus subject to the requirements of the SMA.

While acknowledging that the adoption of a shoreline management plan ("SMP") is essentially a shoreline comprehensive planning and zoning ordinance, Ecology reports that "[s]ome local governments maintain 'stand alone' SMPs, while other SMPs are integrated into [GMA] plans and ordinances."[67] Interestingly, the *Biggers* court did not recognize the

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61. *See, e.g.*, §§ 36.70A.070–.080 (comprehensive planning under GMA); §§ 35.63.080–.100 (comprehensive planning under the Planning Commissions Act); §§ 36.70.320–.350 (comprehensive planning under the Planning Enabling Act); §§ 35A.63.060–.070 (comprehensive planning under the Code); *see also* SETTLE, *supra* note 20, §1.8.

62. WASH. REV. CODE § 90.58.080 (2006).

63. *Id.* § 90.58.140(2)(b).

64. *Id.* §§ 90.58.140–.143.

65. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 349 n.23 (1990).

66. WASH. REV. CODE § 90.58.040 (2006). Under the SMA,

> '[s]horelines' means all of the water areas of the state, including reservoirs, and their associated shorelands, together with the lands underlying them; except (i) shorelines of statewide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes.

WASH. REV. CODE § 90.58.030(2)(d) (2006). The term "shorelands" is defined as:

> those lands extending landward for two hundred feet in all directions as measured on a horizontal plane from the ordinary high water mark; floodways and contiguous floodplain areas landward two hundred feet from such floodways; and all wetlands and river deltas associated with the streams, lakes, and tidal waters which are subject to the provisions of this chapter; the same to be designated as to location by the department of ecology.

WASH. REV. CODE § 90.58.030(2)(f) (2006).

67. Patricia E. Salkin, *Integrating Local Waterfront Revitalization Planning Into Local Comprehensive Planning and Zoning*, 22 PACE ENVTL. L. REV. 207, 229 (2005) (quoting Department of

s congruency between the GMA and the SMA, with respect to plan integration.[68]

B. The Moratorium: An Essential Tool in Land Use Planning

Moratoria serve an essential function for careful land use planners.[69] Recently, the U.S. Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* recognized that "moratoria . . . are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy."[70] In fact, the consensus in the planning community appears to be that "[m]oratoria . . . are an essential tool of successful development."[71] One court has flatly stated that planning without a moratorium would be like "locking the stable after the horse is stolen."[72]

This Section will explain the purposes and uses of permit moratoria in the land use context, recount the legislature's effort to codify procedures for the use of moratoria, evaluate judicial interpretation of that effort, and explore other jurisdictions' treatment of moratoria power in the absence of an express statutory grant of authority by the legislature.

1. Purposes and Uses of Moratoria

When a municipality desires to retain the status quo in the face of uncertainty with regard to future land use, it may utilize one of the most common tools in its regulatory repertoire: the permit moratorium.[73] A permit moratorium is typically classified as a short-term suspension of permit review, rather than a prohibition on a certain activity.[74] Arguably, if the municipality has authority to issue development permits after evaluating requests by developers, it may choose to refuse to issue any

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Ecology, Local Planning, http://www.ecy.wa.gov/programs/sea/sma/local_planning/index.html (last visited Mar. 25, 2006)).

68. *See* discussion *infra* Part III.B.1.

69. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 337–38 (2002).

70. *Id.* at 337.

71. *Id.* at 387–88; *see also id.* at 337 n.32 (citing to numerous state courts recognizing moratoria as a planning tool rather than a regulatory taking).

72. Downham v. City Council of Alexandria, 58 F.2d 784, 788 (E.D. Va. 1932).

73. The other tool is interim zoning, where the "new restrictive zoning is temporarily imposed . . . ." SETTLE, *supra* note 20, § 2.14. In some states the distinction may not matter, but in Washington the two are not functional equivalents. *Id.* The difference stems from the possible vesting of rights during the moratorium period. *See* discussion of the vested-rights doctrine *infra* notes 76–77.

74. *E.g.*, Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996).

permits at all until the changes to the underlying permit qualifications are enacted.

Municipalities use permit moratoria primarily to prevent individual developers from frustrating attempts to change a comprehensive plan by acquiring vested rights.[75] Washington's vested-rights doctrine is unusual in American jurisdictions.[76] Under Washington's rule, a right to build vests when a property owner applies for a permit, as long as the permit is thereafter issued and conforms to any applicable ordinances and codes in force at the time of its issuance.[77] A validly enacted permit moratorium would thus effectively eliminate the vesting of rights during the time period in which the permit moratorium remains in force.

Prior to the enactment of Washington's moratoria provisions,[78] an interim zoning ordinance was validated even though it did not conform to statutorily prescribed procedures.[79] In *Jablinske v. Snohomish County*, the court upheld an interim ordinance altering the zoning near Paine Field in anticipation of an upcoming expansion of the airport.[80] The petitioners had challenged the ordinance after the county denied their permit application for the construction of multifamily housing.[81] In rejecting the petitioners' argument, the court stated: "[T]he better-reasoned view recognizes that if notice and hearing requirements were applied to interim zoning decisions, developers could frustrate effective long-term planning by obtaining vested rights to develop their property."[82]

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75. Jablinske v. Snohomish County, 28 Wash. App. 848, 851, 626 P.2d 543, 545 (1981).

76. *See* W. Land Equities, Inc. v. City of Logan, 617 P.2d 388, 394 (Utah 1980). Washington rejects the general rule that vested rights can be protected against future zoning changes if a developer has substantially changed position in reliance on the permit. *Id. Compare* Gregory Overstreet & Diana M. Kirchheim, *The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest*, 23 SEATTLE U. L. REV. 1043 (2000), *with* Roger D. Wynne, *Washington's Vested Rights Doctrine: How We Have Muddled a Simple Concept and How We Can Reclaim It*, 24 SEATTLE U. L. REV. 851 (2001).

77. *See* SETTLE, *supra* note 20, § 2.7(b) (citing Hull v. Hunt, 53 Wash. 2d 125, 331 P.2d 856 (1958)). This is not meant to be a precise statement of the entire vested-rights doctrine, as the true meaning and force of the rule is up for debate. Rather, it is intended to inform the reader of the basic premise of the rule, in order to enhance understanding of the motivations behind enacting permit moratoria in the face of changing comprehensive plans.

78. *See* discussion *infra* Part II.B.2.

79. Jablinske v. Snohomish County, 28 Wash. App. 848, 851, 626 P.2d 543, 545 (1981).

80. *Id.* at 849–50, 626 P.2d at 544.

81. *Id.* at 849, 626 P.2d at 544.

82. *Id.* at 851, 626 P.2d at 545. The court continued: "[t]his is especially true in Washington where an owner's right to use his property under existing zoning vests upon the application for a building permit." *Id.* (citing State *ex rel.* Ogden v. Bellevue, 45 Wash. 2d 492, 275 P.2d 899 (1954)).

2. Statutory Provisions for Moratoria: The 1992 Amendments

The state legislature codified municipal power to enact moratoria by amending six statutes in 1992.[83] It placed the moratoria provisions in a number of planning statutes, including the Planning Commission Act, Planning Enabling Act, GMA, and the Code.[84] In the final bill report on the amendments, the legislature articulated the primary reasons for providing procedures for moratoria: avoiding overtaxing existing infrastructure, avoiding a rush of development in anticipation of more restrictive land use regulations, allowing time for the considered development of a master plan; and preventing the despoliation of water or air.[85]

Each amendment enacted with this bill possesses identical core language:

> [The governing body of a county, city, or town] that adopts a moratorium, interim zoning map, interim zoning ordinance, or interim official control without holding a public hearing on the proposed moratorium, interim zoning map, interim zoning ordinance, or interim official control, shall hold a public hearing on the adopted moratorium, interim zoning map, interim zoning ordinance, or interim official control within at least sixty days of its adoption, whether or not the board received a recommendation on the matter from the commission or department. If the [governing body] does not adopt findings of fact justifying its action before this hearing, then the [governing body] shall do so immediately after this public hearing. A moratorium, interim zoning map, interim zoning ordinance, or interim official control adopted under this section may be effective for not longer than six months, but may be effective for up to one year if a work plan is developed for related studies providing for such a longer period. A moratorium, interim zoning map, interim zoning ordinance, or interim official control may be renewed for one or more six-month periods if a subsequent public hearing is held and findings of fact are made prior to each renewal.[86]

As written, the statute presents an interesting question of whether the provision is an express grant, or rather a limitation on an already existing power held by municipalities.[87] Parsing and interpreting the

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83. Moratorium and Interim Zoning—Public Hearings, 1992 Wash. Legis. Serv. Ch. 207 (West) (codified as amended in scattered sections of WASH. REV. CODE Titles 35, 35A, 36, and 70).

84. *Id.*; *see also* Wynne, *supra* note 76, at n.161. The amendment also inserted the moratorium provision into the Code.

85. SUBSTITUTE S. FINAL BILL REP. 52-5727, Reg. Sess., at 1 (Wash. 1992).

86. Moratorium and Interim Zoning—Public Hearings, ch. 207, 1992 Wash. Sess. Laws 940 (codified at WASH REV. CODE §§ 35.63.200, 35A.63.220, 36.70.795, 36.70A.390, 70.05.160).

87. This question was posed immediately after the bill's passage. S. 52-5727, Reg. Sess., at 2 (Wash. 1992) ("It is not clear if these statutes limit the circumstances under which any

language of the provision begins with an examination of the passage: "[a] council or board *that adopts* a moratorium . . . ."[88] Without any sort of granting language, such as "may," the clause is unclear about the source of the power. If the first sentence of the statute stated "[a] council or board *may adopt* a moratorium," one would agree that the language expressly granted authority to municipalities employing the statute. As the language is written, however, one may infer that the power to enact a moratorium derives from another source, such as the municipality's charter or its constitutionally delegated police power.[89] Further, language found elsewhere in the statute—"[a] moratorium . . . *adopted under this section*"[90]—is not accompanied by any further granting language. Arguably, this indicates that the relationship between the statute and the moratorium power is not one where the statute contains the grant of moratorium power. Rather, the language indicates that power to wield the moratorium tool exists independently of the statute, but that the municipality may use the tool it already possessed while planning under the statute, subject to the procedural restraints detailed in the section.[91] Viewed in this light, the statute may not grant power; instead, it might only circumscribe the use of power when a municipality employs the moratorium tool to effectuate the statute.

Notably absent from the 1992 amendments is any mention of the SMA. As such, the SMA contains no provision concerning moratoria whatsoever. Legislative history surrounding the amendments is scant, but the original Senate bill was far broader in substantive scope.[92] In the language of that legislation, the words "shorelines" and "wetlands" appear,[93] possibly indicating that the Senate might have had the SMA in mind when drafting the bill. Once the bill went to the House of Representatives, it was revised into the form present in the final legislation.[94] The

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moratoria . . . may be adopted, or whether general authority to establish moratoria . . . remains and the statutes only restrict moratoria . . . as defined under the legislation.").

88. WASH. REV. CODE § 35.63.200 (2006) (emphasis added).

89. *See* discussion *infra* Part IV.B.

90. WASH. REV. CODE § 35.63.200 (2006) (emphasis added).

91. *See* discussion *infra* Part II.B.3. *Contra* Matson v. Clark County Bd. of Comm'rs, 79 Wash. App. 641, 646, 904 P.2d 317, 319 (1995) (rejecting this line of argumentation by interpreting the language as an express grant).

92. S.B. 5727, 1991 Leg., Reg. Sess. (Wash. 1991).

93. *Id.* at 2. Shorelines and wetlands are included in the proposed bill's definition section as "facilities." *Id.* The bill prescribed conditions under which a permit-granting agency could enact a moratorium in order to respond to a facilities- or resource-based emergency. *Id.* at 3.

94. Washington State Legislature, History of Bill: SB 5727, http://dlr.leg.wa.gov/billsummary/default.aspx?year=1991&bill=5727 (last visited July 28, 2007). On February 28, 1992, the local-government committee in the State House of Representatives recommended passage with amendments. *Id.* The so-called "amendments" were really a complete rewrite of the bill that resulted in its final adopted form.

result was legislative silence on the moratoria power of local governments administering the SMA.

3. Judicial Interpretations of the 1992 Amendments

Prior to its decision in *Biggers*, Division Two interpreted the statutory language regarding moratoria in the Planning Commissions Act[95] as an express grant of authority. Recently, in *Matson v. Clark County Board of Commissioners*, the court addressed landowners' challenges to two emergency ordinances enacted in 1993.[96] One of the ordinances was a temporary ban on new cluster subdivisions, properly characterized as a moratorium.[97] The court emphasized the now-familiar language—a "moratorium . . . adopted under this section"—and interpreted it as "authoriz[ing] the enactment of a moratorium . . . by the Board."[98] Perhaps foreshadowing its disposition in *Biggers*, the court rejected an argument by the property owners that the statute limits, as opposed to authorizes, municipal power to enact temporary moratoria.[99] The court opined that any other reading would render the emphasized language superfluous because no other language was present in the Act which would serve to authorize counties to enact moratoria.[100]

The character of argumentation in *Matson* was no doubt substantially different from that in *Biggers* because the *Matson* court had specific statutory language to interpret, rather than trying to assign meaning to legislative silence.[101] Nevertheless, the dispute underlying the court's cursory discussion of the real purpose of the phrase "adopted under this section" is very much at the heart of both cases. While the *Matson* court considered itself bound by the strictures of statutory interpretation,[102] the opinion fails to fully explain why the argument of limitation rather than authorization renders the language superfluous.[103] By venturing down the path of least resistance, the court arguably reached the proper result.

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95. WASH. REV. CODE § 35.63.200 (2006) (emphasis added). The Planning Commissions Act is Washington's first land use planning statute. *See* SETTLE, *supra* note 20, § 1.4.

96. *Matson*, 79 Wash. App. at 643, 904 P.2d at 318.

97. *Id.*

98. *Id.* at 645–46, 904 P.2d at 319. Also, the court noted that the provision "specifically authorizes interim zoning controls and moratori[a] under the GMA." *Id.* at 646, 904 P.2d at 320.

99. *Id.* at 644–46, 904 P.2d at 319–20.

100. *Id.* at 645–46, 904 P.2d at 319.

101. Recall that the statutory language concerning moratoria is not found anywhere within the SMA. WASH. REV. CODE § 90.58 (2006).

102. *Matson*, 79 Wash. App. at 645, 904 P.2d at 319 (citing Wash. Econ. Dev. Fin. Auth. v. Grimm, 119 Wash. 2d 738, 746, 837 P.2d 606, 610–11 (1992)) ("We construe statutes so that no clause, sentence, or word is superfluous, void, or insignificant.").

103. *Id.* at 645–46, 904 P.2d at 319.

This approach is certainly not inappropriate, but one which hindered the same court later in *Biggers*.

Moreover, Washington's moratoria provisions have been accepted by a federal court as valid zoning tools.[104] The court in *Sprint Spectrum* did not need to reach the question of whether the moratoria authority encompassed constitutionally derived police powers with statutory guidelines or a specific grant of authority under the statute, as the validity of the moratorium at issue before the district court was only a threshold question to the ultimate issue of whether the moratorium was in conflict with federal law.[105] The court accepted that it was valid under the Code[106] and did not conflict with federal law.[107]

4. Moratoria Power in Other Jurisdictions

Because the SMA does not expressly confer moratoria authority to municipalities, a look at how other jurisdictions handle similar situations is appropriate. Municipal power to implement moratoria without an express grant from the legislature is far from uniform in American jurisdictions.[108] Nonetheless, under the conventional view,[109] courts uphold moratoria, despite the lack of an express statutory grant of authority, as a use of delegated police power.[110] Other state courts have found sufficient authority for moratoria in so-called "home rule" provisions.[111] Where general land use planning enabling legislation does not expressly authorize moratoria, it "may imply delegation of authority to do so."[112] For example, in *Miller v. Board of Public Works of Los Angeles*, the California Supreme Court held that an emergency zoning measure in the form of a restriction on multifamily housing within a certain residential district, pending the adoption of a comprehensive zoning plan, was a valid

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104. Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1039 (W.D. Wash. 1996).

105. *See id.* at 1037.

106. WASH. REV. CODE § 35A.63.220 (2006).

107. *See Sprint Spectrum*, 924 F. Supp. at 1039–40.

108. 1 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 13:10 (4th ed., rev. 2005).

109. Matthew G. St. Amand & Dwight H. Merriam, *Defensible Moratoria: The Law Before and After the* Tahoe-Sierra *Decision*, 43 NAT. RES. J. 703, 710 (2003); ZIEGLER, *supra* note 108; *see also* Collura v. Town of Arlington, 329 N.E.2d 733, 737 (Mass. 1975) (citing to numerous cases supporting the court's conclusion that "[t]he weight of authority is that reasonable interim zoning provisions may be enacted within the scope of a general zoning enabling act, without reliance on specific statutory authorization for interim ordinances.").

110. This is the police power exception to the harsh application of Dillon's Rule. *See* discussion *infra* notes 181, 183.

111. Amand & Merriam, *supra* note 109. Recall the discussion of the home rule doctrine *supra* note 26.

112. *Id.* (citing Bernhard v. Planning & Zoning Comm'n of Westport, 619 A.2d 1160 (Conn. App. Ct. 1993)).

exercise of the municipality's police power.[113] California is an especially relevant comparison to Washington given that the Washington Constitution was modeled in part on the California Constitution.[114] Also, in the absence of an explicit expression of a contrary purpose by the legislature, the Minnesota Supreme Court has held that, under general principles conferring broad police powers upon municipalities, municipalities have authority to adopt moratorium ordinances of limited duration, provided they are enacted in good faith and without discrimination.[115]

Despite the conventional view, a few state courts have held that in the absence of express statutory authority, local governments lack the power to enact moratoria.[116] In *Naylor v. Township of Hellam*, the Pennsylvania Supreme Court held that a municipality's power to impose a moratorium on subdivision approvals while revising its comprehensive zoning plan was invalid, as it was neither implicitly granted nor incidental to the powers expressly conferred under the planning enabling act in force.[117] Additionally, in *Lancaster Dev. Ltd. v. River Forest*, the Illinois Appellate Court held invalid a temporary zoning measure that prevented the issuance of a permit until three months after the question of amending the zoning ordinance was referred to the zoning board of appeals.[118] In Washington, the power to enact moratoria, in the absence of express statutory authority, would be tested when Bainbridge Island decided to suspend permits for shoreline armoring in 2001.

III. CASE HISTORY OF *BIGGERS*

A. History of the Blakely Harbor Moratorium

A relatively routine exercise of local authority gave rise to the dispute in *Biggers*. The Bainbridge Island City Council, responding to

113. Miller v. Bd. of Pub. Works of L.A., 234 P. 381, 388 (Cal. 1925); *accord* Jablinske v. Snohomish County, 28 Wash. App. 848, 851, 626 P.2d 543, 545 (1981); *see also* Amicus Curiae Brief of Snohomish County, *supra* note 17, at 10 (urging adoption of the California model before the Washington Supreme Court).

114. Brief of Amici Curiae Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development at 8, Biggers v. City of Bainbridge Island, 156 Wash. 2d 1005, 132 P.3d 146 (2006) (No. 77150-2), 2006 WL 937646 (citing ARTHUR S. BEARDSLEY, *The Sources of the Washington Constitution as Found in the Constitutions of the Several States*, *in* CONSTITUTION OF THE STATE OF WASHINGTON xxix (1939)).

115. Almquist v. Town of Marshan, 245 N.W.2d 819, 825 (Minn. 1976).

116. This is a judicial resolution based on the most restrictive reading of a rule limiting construction of municipal power: Dillon's Rule. *See* discussion *infra* notes 181, 183.

117. Naylor v. Twp. of Hellam, 773 A.2d 770, 775 (Pa. 2001).

118. Lancaster Dev. Ltd. v. River Forest, 228 N.E.2d 526, 529 (Ill. App. Ct. 1967) (reasoning that the statute mandated a particular procedure and that an interim zoning measure without notice and comment fell outside of the statutory authority). Washington has rejected the *Lancaster* rule. *See* Jablinske v. Snohomish County, 28 Wash. App. 848, 851, 626 P.2d 543, 544–45 (1981).

community pressure concerning the construction of overwater structures on Blakely Harbor,[119] adopted an ordinance on August 22, 2001, to preserve the status quo.[120] The ordinance's specific purpose was "to enable amendments to the shoreline master program to be completed by September 2002 and to conduct an analysis of cumulative impacts."[121] In October, the city adopted the moratorium at issue in *Biggers*.[122]

Substantively, the ordinance contained two significant provisions. First, the ordinance imposed a limited shoreline moratorium on permit applications for new overwater construction and new shoreline armoring.[123] Second, the ordinance exempted permits "relating to the construction of single-family residences, and their normal appurtenances."[124] The moratorium restricted applications on new overwater construction and shoreline armoring because these structures had the "greatest potential to impact shoreline habitat."[125]

Blakely Harbor, located in the southeastern quadrant of the island, "is one of the last undeveloped harbors in central Puget Sound . . . ."[126] Bainbridge Island expressed the purpose of the moratorium in simple terms:

> The [m]oratorium is necessary while the [c]ity considers the appropriate scientific information, and prepares and considers the revisions to the [s]horeline [m]aster [p]rogram and critical areas ordinance. The [c]ity's land use and planning process, as well as the protection of critical salmonid habitat, will suffer significant harm if the [m]oratorium is not in place until the [c]ity completes the revisions to the [s]horeline [m]aster [p]rogram and critical areas ordinance.[127]

With the moratorium in place, the city would be able to complete those revisions and regulate free from the frustrating effects of vested rights under the old permit requirements and shoreline master plan.

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119. City of Bainbridge Island's Opening Brief, *supra* note 3, at 4.

120. City of Bainbridge Island, Wash., Ordinance 2001-34 (Aug. 22, 2001); Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 861, 103 P.3d 244, 245 (2004).

121. City of Bainbridge Island's Opening Brief, *supra* note 3, at 5.

122. City of Bainbridge Island, Wash., Ordinance 2001-45 (Oct. 10, 2001).

123. City of Bainbridge Island's Opening Brief, *supra* note 3, at 6 (reciting portions of the ordinance).

124. *Id.*

125. *Biggers*, 124 Wash. App. at 861, 103 P.3d at 245.

126. City of Bainbridge Island's Opening Brief, *supra* note 3, at 4.

127. *Id.* at 9.

B. The Biggers *Opinion*

The plaintiff property owners prevailed on their original challenge of the moratorium at trial when the court granted their motion for summary judgment.[128] Bainbridge Island filed an appeal with Division Two.[129] Answering the question of whether the moratorium was valid, the court of appeals held that it was not and affirmed the trial court's decision.[130] The court presented a curt, twofold rationale. First, rejecting the city's argument that it had authority to enact a moratorium under either the Code or the GMA,[131] the court interpreted the absence of a moratorium provision in the SMA as providing no textual basis for moratorium authority in the SMA.[132] Second, the court rejected the city's argument that the GMA "applies to shoreline development, to the exclusion of the SMA or the [c]ity's [shoreline master plan]."[133] Rather, the court held that the GMA clearly specifies that the SMA "governs the unique criteria for shoreline development."[134] The court continued by stating that the "SMA trumps the GMA in this area, and the SMA does not provide for moratoria on shoreline use or development."[135] Next, each of these rationales will be considered in turn.

1. Specific Holding: Statutes as Islands

Though the court was terse in its rejection of the argument that either the GMA or the Code can provide the necessary moratorium authority, the subtext of this rationale is quite apparent. To wit, these statutes do not interrelate; they are islands in the law. Thus, without an express grant of power by the state legislature, the municipality has no power to enact moratoria for shoreline development permits under the SMA. In order to reach such a conclusion, the court adhered to a version of strict construction of local government authority.[136] In its opening brief before the court of appeals, the city cited to *Weden v. San Juan County*[137] for the proposition that a court will "not interpret a statute to deprive a municipality of the power to legislate on particular subjects unless that clearly is

128. *Biggers*, 124 Wash. App. at 862, 103 P.3d at 246.
129. *Id.*
130. *Id.* at 867, 103 P.3d at 249.
131. *Id.* at 866, 103 P.3d at 248.
132. *Id.*
133. *Id.* at 866–67, 103 P.3d at 248.
134. *Id.* at 867, 103 P.3d at 248–49.
135. *Id.*
136. *See* discussion regarding Dillon's Rule *infra* Part IV.B and notes 181, 183.
137. Weden v. San Juan County, 135 Wash. 2d 678, 958 P.2d 273 (1998).

the legislative intent."[138] Any mention of *Weden* is notably absent from the court's opinion, but the court's application of the rule from *City of Spokane v. J-R Distribs*[139] indicates that the *Weden* rule was impliedly rejected.

The court reasoned that the Code does not apply because it is "limited to planning and zoning," and that the GMA does not apply because it is "limited to growth management in selected counties and cities."[140] The opinion continued: "Thus, neither statute grants the authority the [c]ity describes . . . ."[141] Neither of these structural arguments addresses the *Weden* rule, that silence runs in favor of the municipality, subject to the three-part test, but they do support the assertion that the court implicitly rejected *Weden* in favor of the rule in *J-R Distribs.*, that statutory silence runs against the municipality. Recall that the court in *Matson* determined that the statutory moratoria language was an express grant of power rather than a limitation thereof.[142] The *Biggers* court did not cite to *Matson*, but the implication is clear: If the enabling statute did not give the municipality the power, the municipality does not possess it—a notion diametrically opposed to *Weden*.

2. Specific Holding: GMA/SMA Interplay

The *Biggers* court rejected a second argument by the city that contended the moratoria provisions of the GMA apply to the exclusion of the SMA or the city's shoreline master program.[143] In actuality, the city's argument was more nuanced, asserting that a harmonization of the provisions of the GMA and the SMA necessarily led to a conclusion that Bainbridge Island had the power to enact the moratorium.[144] The city urged that in enacting the GMA, the legislature anticipated that changes to comprehensive plans would be performed under the statute.[145] The

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138. City of Bainbridge Island's Opening Brief, *supra* note 3, at 30 (quoting *Weden* at 695, 958 P.2d at 281–82).

139. City of Spokane v. J-R Distribs., Inc., 90 Wash. 2d 722, 726, 585 P.2d 784, 786 (1978) ("[A municipal corporation] has neither existence nor power apart from its creator, the legislature, except such rights as may be granted to municipal corporations by the state constitution.").

140. *Biggers*, 124 Wash. App. at 866, 103 P.3d at 248.

141. *Id.*

142. Matson v. Clark County Bd. of Comm'rs, 79 Wash. App. 641, 643, 904 P.2d 317, 318 (1995).

143. *Biggers*, 124 Wash. App. at 866–67, 103 P.3d at 248.

144. *See* City of Bainbridge Island's Opening Brief, *supra* note 3, at 40.

145. *See id.* at 35 (citing WASH. REV. CODE § 36.70A.130(1)(a) (2004)). This statute reads: Each comprehensive land use plan and development regulations *shall be subject to continuing review and evaluation by the county or city that adopted them.* Except as otherwise provided, a county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and

city asserted that statutory language within the GMA indicates that shoreline master programs are to be considered part of the city's comprehensive plan under the GMA.[146] Thus, changes to comprehensive plans can be aided by the use of moratoria power granted by the GMA[147] to preserve the status quo during the reconsideration period.

In rejecting this argument, the court relied on language from the GMA stating that a shoreline master program shall be adopted pursuant to the procedures of the SMA.[148] The court reasoned that "the GMA states that the provisions of the [SMA] take priority over the GMA as long as the provisions are internally consistent . . . . The GMA clearly specifies that [the SMA] governs the unique criteria for shoreline development."[149] Finally, the court concluded that the "SMA trumps the GMA in this area, and the SMA does not provide for moratoria on shoreline use or development."[150] One must certainly infer from the court's strict constructionist approach that only an express grant by the legislature, in the SMA, would have satisfied the court in its review of the city's action.[151]

3. Subsequent Response to the Decision

Soon after the *Biggers* opinion came down, the Court of Appeals of Washington, Division One, disagreed with the *Biggers* court's interpretation of the GMA/SMA interplay.[152] In *Preserve Our Islands v. Shoreline Hearings Bd.*, a citizen's group and King County appealed the Shoreline Hearings Board's order requiring the County to issue shoreline development permits to an aggregate mining company for expansion of its loading dock, located on the southeastern shore of Maury Island.[153] Under the GMA, the company's central mining operation on the island was designated as a mineral resource land.[154] Because the court accepted the

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regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section.

WASH. REV. CODE § 36.70A.130(1)(a) (2006) (emphasis added).

146. *See* City of Bainbridge Island's Opening Brief, *supra* note 3, at 40 (citing WASH. REV. CODE § 36.70A.480(1) (2006) ("The goals and policies of a master program adopted under the SMA are considered to be an element of a city's comprehensive plan required under the [GMA].").

147. WASH. REV. CODE § 36.70A.390 (2006).

148. *Biggers*, 124 Wash. App. at 867, 103 P.3d at 248 (quoting WASH. REV. CODE § 36.70A.480(2) (2006)).

149. *Id.*

150. *Id.*

151. *See* discussion *supra* Part III.B.1.

152. *See* Pres. Our Islands v. Shoreline Hearings Bd., 133 Wash. App. 503, 137 P.3d 31 (2006).

153. *Id.* at 509, 137 P.3d at 34.

154. *Id.*

argument that the dock loading operation—although physically separated from the central mining operation—was part of the total mining operation, it held that the company was entitled to a shoreline development permit because the mining operation was "water dependent," as defined in the GMA.[155]

The court of appeals rejected the appellants' contention that, despite its mineral use designation under the GMA, comprehensive plan, and zoning code, such a designation did not affect the principal use of the company's docking facility. Employing the rule of *Biggers*, the appellants asserted that the SMA takes priority over the GMA for shoreline development.[156] The court disagreed, reasoning that the section of the GMA relating to the SMA "does not say that, and in fact it requires that regulations implementing the two statutes be harmonized in the process of overall land use planning and regulation."[157] Moreover, the court stated:

> [The GMA] specifically states that a county's shoreline master program goals and policies are part of that county's GMA comprehensive plan, and the [c]ounty's shoreline master program regulations are development regulations. Consistent with this provision, the GMA defines "[d]evelopment regulations" as "the controls placed on development or land use activities by a county or city, including, but not limited to . . . *shoreline management programs.*" In accordance with the GMA, the County adopted its Shoreline Policies as part of its comprehensive plan and its Shoreline Code as part of its GMA development regulations. [The GMA] states that development regulations must be consistent with and implement the comprehensive plan. Any other interpretation would create chaos in attempts to implement and apply the numerous, varied and sometimes competing policies and regulations governing the use of land.[158]

If that line of reasoning sounds familiar, it is because it was essentially the same argument made by the city of Bainbridge Island in *Biggers*.[159] Ironically, where Bainbridge Island would use GMA authorization to permit its implementation of a moratorium to change its shoreline master plan without the specter of vested rights, the mining company in *Preserve Our Islands* would transplant its permit requirement satisfaction under the GMA in order to bypass independent scrutiny of its shoreline development purposes.

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155. *Id.* at 510, 137 P.3d at 34.
156. *Id.* at 522, 137 P.3d at 41.
157. *Id.* at 523, 137 P.3d at 41.
158. *Id.* at 524, 137 P.3d at 42 (internal footnotes omitted).
159. *See* discussion *supra* Part III.B and accompanying footnotes.

While the cases are quite different factually, this common issue, at a certain level of abstraction, unites them. At the core of both these scenarios is the question of whether the GMA can supplant the SMA or whether there is a dividing line of jurisdiction between the two statutes. While *Preserve Our Islands* is probably a better factual pattern for the specific test[160] of GMA/SMA interplay than is *Biggers*—as the former involved shoreline permitting for one private entity—its reasoning, that the two regulatory acts be harmonized as part of one development regulatory scheme, directly opposes the reasoning supporting the non-overlapping jurisdiction theory of *Biggers*.[161]

C. Problems with the Result

As the court in *Preserve our Islands* suggested, the result of the *Biggers* court's holding is that municipalities and developers will be subject to odd and incongruous results going forward. For instance, because the court in *Biggers* recognized that both the Code and the GMA authorize municipalities to enact moratoria,[162] if a town wishes to change its master plan anywhere but 200 feet shoreward of the ordinary high water mark,[163] it may employ a moratorium while it considers its options. If the planning changes are to affect the land within the designated zone of control under the SMA, however, then a municipality's choices are limited to: (1) not enacting changes to a master plan; (2) hastily enacting changes, thus inviting error and ill-conceived rulemaking; or (3) enacting far-more-restrictive shoreline master plans initially and subsequently loosening the restrictions.[164]

Shoreline management plans, like other land use master plans, are not carved in stone. As discussed, a viable moratoria power furthers many values important to municipalities.[165] In addition, a moratoria

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160. Ultimately, *Biggers* is a case about power, rather than statutory harmonization, whereas *Preserve Our Islands* presents the statutory harmonization question in sharper form.

161. The term "non-overlapping jurisdiction theory" is used to refer to the *Biggers* court's holding that the SMA governs the unique criteria of shoreline regulation. Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 867, 103 P.3d 244, 248 (2004).

162. *Id.* at 865 n.6, 103 P.3d at 247 n.6.

163. WASH. REV. CODE § 90.58.030(2)(f) (2006); Buechel v. State Dep't of Ecology, 125 Wash. 2d 196, 884 P.2d 910 (1994).

164. Arguably, this is a point of some contention. If a municipality did this, one might expect litigation challenging this type of action as an invalid interim zoning control, even though on its face the regulation would not be defined as interim. Because the SMA does not contain any language that relates to that option, the approach in *Biggers* might invalidate it. Additionally, one would assume significant public opposition to stringent management plans. Either way, this option is far from ideal.

165. *See* discussion *supra* Part II.B.1. Specifically, moratoria prevent piecemeal development, improve deliberation on planning issues, and allow an appropriate response to emergencies.

power under the SMA would serve another important normative value—environmental protection. Where a municipality has recognized a new environmental threat to the shorelines, or the wildlife habitat thereon, by development otherwise permitted under existing regulations, it may need to move quickly to block further development while studying the efficacy of new regulations. Vested rights under prior rules would no doubt frustrate that effort and allow the newly discovered environmental harm to occur. Thus, the absence of moratoria authority frustrates the very purpose of the SMA.[166]

IV. POTENTIAL RESOLUTIONS: A PROBLEM OF POWER

Biggers in the abstract is emblematic of the central tensions in land use law. How does the law provide the necessary discretion to local communities to regulate as well as guarantee stability and fairness to private property owners?[167] Further, assuming that the proposed regulation is reasonable, from where is that discretionary power to be drawn?

To extinguish *Biggers*' incongruity with municipal power under other planning statutes and the Washington Constitution, the Washington Supreme Court should reverse and remand this decision.[168] There are two existing legal theories under which the Supreme Court could hold that a municipality's power to enact moratoria exists under the SMA—or at least without offending the SMA. First, the court could adopt the approach used in *Preserve Our Islands*, thereby harmonizing the SMA and the GMA and allowing a municipality to derive its authority from the GMA. Second, the court could reinforce *Weden* and allow cities to rely on their constitutionally delegated police powers. Under a third theory, not argued before the court, a municipality charged with administering permit programs could be considered an administrative agency for the

166. WASH. REV. CODE § 90.58.020 (2006) ("There is . . . a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by the federal, state, and *local governments*, to prevent the inherent harm in an *uncoordinated and piecemeal development* of the state's shorelines.") (emphasis added).

167. *See generally* DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION 44 (2d ed. 2004).

168. The Washington Supreme Court has granted review. Biggers v. City of Bainbridge Island, 156 Wash. 2d 1005, 132 P.3d 146 (2006). The city has since adopted its updated shoreline management plan. Bainbridge Island, Wash., Ordinance 2003-30 (Sept. 10, 2003). Other homeowners in the Blakely Harbor area challenged the new plan, but before litigation on the merits, the city and the homeowners settled out of court, staying the pending litigation in both state and federal court. Settlement Agreement, Mutual Release of Claims, & Hold Harmless Agreement, Samson v. City of Bainbridge Island, No. C05-5197RJB (W.D. Wash Aug. 29, 2006), *available at* www.ci.bainbridge-isl.wa.us/documents/Blakely%20Harbor%20Final%20Settlement.pdf. The settlement agreement recognizes that the Washington Supreme Court will render an opinion, but that on remand the parties will move to stay the litigation pursuant to the settlement agreement. *Id.* at 8.

purposes of the SMA and afforded the concomitant measure of judicial deference. Both the positive and negative aspects of each of these approaches are next explored.

A. Derivative Statutory Authority

The Washington Supreme Court has granted review of *Biggers*,[169] but has not, as of this writing, granted review in *Preserve Our Islands*. If it chooses to reverse *Biggers*, the court could rule that the SMA is not the exclusive regulatory scheme for the "various shorelines of the state,"[170] and it could hold that when a municipality wishes to update any part of its comprehensive plan, it may employ the GMA's grant of moratoria authority. To do so, the court must untangle a web of statutory provisions in which there is often conflicting language. It is a risky proposition, for if the court prioritizes one statute over the other, it will no doubt be accused in certain circles of judicially expanding the GMA, a charge that will not be without merit.[171] A commentator has noted that the GMA was born amid controversy, whereas the SMA arose from consensus.[172] If the court is seen as allowing the GMA to swallow the SMA to some degree, negative reaction to the opinion would be reasonably grounded on a contention that the court has allowed the expansion of a controversial regulatory program at the expense of a relatively agreeable program.

At bottom, a holding on the GMA/SMA interplay issue will turn on theories of jurisprudence advanced by the court. Should the court take a textualist approach, it could readily hold the SMA "trumps" the GMA in

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169. Biggers v. City of Bainbridge Island, 156 Wash. 2d 1005, 132 P.3d 146 (2006).

170. City of Bremerton v. Sesko, 100 Wash. App. 158, 162, 995 P.2d 1257, 1259 (2000) ("Although RCW 90.58.100(1) states that Shoreline Master Programs 'shall constitute use regulations for the various shorelines of the state,' it does not state that such programs shall be the exclusive land use regulations of lands located on the shoreline." (quoting WASH. REV. CODE § 90.58.100(1) (2006))).

171. The GMA has not been universally welcomed with open arms. *See* Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5, 34 (1999). Some of its more contentious provisions, such as those dealing with critical areas designation, have produced some measure of political backlash, and the court is not immune to such stirrings. *See generally* Lewis Kamb, *Justices' Election Dilemma: Can They Be Fair? P-I Review Finds Many Potential Conflicts of Interest on High Court*, SEATTLE POST-INTELLIGENCER, Mar. 14, 2005, at A1 (noting that several justices on the current court have reported financial contributions from the Building Industry Association of Washington); Gregory Roberts, *Special-Interest Money Fueling Judicial Races Groups Pay to Push Specific Ideologies*, SEATTLE POST-INTELLIGENCER, Sept. 15, 2006, at A1. Thus, even if some of its early opponents now accept the GMA as "the status quo," Eric Pryne, *I-933 Finds Support Lukewarm*, SEATTLE TIMES, Aug. 27, 2006, at B1, if the court is perceived as judicially expanding this program, the anti-GMA movement might find new life.

172. Settle, *supra* note 171 (discussing judicial review of GMA provisions).

its jurisdiction.[173] The GMA mandates that a shoreline management program shall be adopted pursuant to the procedures of the SMA rather than the procedures of the GMA for the adoption of comprehensive plans.[174] The plain meaning of the word "procedure" arguably encompasses using a moratorium to solidify the status quo while planning proceeds. This would obviate an approach that would treat a shoreline management plan as part of a comprehensive plan under the GMA at the point of either creation or alteration.

Should the court choose to take a structural approach, it could more easily justify a holding that the GMA's provisions can provide the necessary authority to enact permit moratoria. Under this approach, the court would need to accept a theory of overlapping jurisdiction between the SMA and GMA and then hold that under the GMA, shoreline plans are part of comprehensive plans. It would then follow that any changes to those plans could be effectuated using powers authorized under the GMA. This structural approach, however, may have been foreclosed by the legislature.[175] With respect to the issue of critical areas designation and regulation, the legislature has explicitly endorsed a non-overlapping jurisdiction approach.[176]

In many respects, the strict formalism of *Biggers* is reinforced by legislative intent and considerations of fairness. First, the legislature, in implementing the so-called "Everett fix," through its statutory overruling of a Growth Management Hearings Board decision harmonizing GMA and SMA provisions,[177] has endorsed the non-overlapping jurisdiction approach in the context of critical areas designation. Second, though the original version of the moratorium bill mentioned shorelines, that

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173. In other words, the Washington Supreme Court could affirm the holding of the lower court. *Biggers*, 124 Wash. App. at 867, 103 P.3d at 248–49.

174. WASH. REV. CODE § 36.70A.480(2) (2006).

175. The state legislature may have spoken to this issue. In recent amendments to the GMA, the legislature implemented what is known to land use attorneys as the "Everett fix." Telephone Interview with Laura Kisielius, Deputy Prosecuting Attorney, Snohomish County, Wash. (Jan. 27, 2007). In a recent decision, the Growth Management Hearings Board attempted to harmonize the two statutes. Everett Shorelines Coal., Case No. 02-3-0009c (Cent. Puget Sound Growth Mgmt. Hearings Bd. Jan. 9, 2003), *available at* http://www.gmhb.wa.gov/central/decisions/2003/2309c_Corrected_ESC_FDO.htm. The result was a lengthy opinion, accompanied by a graphical model, detailing how the statutes were meant to work together. Essentially, the board adopted an overlapping jurisdictional approach. *Id.* Despite the board's best efforts, the legislature subsequently adopted amendments that overruled the board's holding. 2003 Wash. Sess. Laws 1693 (codified in relevant part at WASH. REV. CODE § 36.70A.480(3) (2006)).

176. 2003 Wash. Sess. Laws at 1694 ("The legislature intends that critical areas within the jurisdiction of the shoreline management act shall be governed by the [SMA] and that critical areas outside the jurisdiction of the [SMA] shall be governed by the [GMA].").

177. *See* discussion *supra* note 175.

language appears nowhere in the final version. Third, in view of the statutory provisions in both acts, it seems that the legislature did not desire that one act take precedent over the other. Finally, as *Preserve Our Islands* suggests, a strict non-overlapping jurisdiction approach creates redundant regulations on private parties that may have fully conformed to GMA requirements.[178]

A technically correct opinion on one issue, however, does not necessarily guarantee a just disposition. Thus, the court should consider another way to resolve the underlying questions of municipal power. The following alternative is preferable because it is a tidier, more satisfying way of resolving the issue that avoids resorting to overly meddlesome statutory comparisons.

B. Delegated Police Power: Reinforcing Weden

No case in Washington has specifically held that moratoria fall within the scope of the municipal police power. Nevertheless, it has been argued that such a conclusion follows[179] from the myriad of cases recognizing zoning ordinances as police powers.[180] In deciding *Biggers*, the Washington Supreme Court should rule that moratoria authority is included within the delegated municipal police power.

Before considering the city's argument that either the Code or the GMA provided moratoria authority, the court of appeals in *Biggers* court cited a principle: "A city exists and derives its authority and power from the state constitution and the legislature. 'It has neither existence nor power apart from its creator, the legislature, except such rights as may be granted to municipal corporations by the state constitution.'"[181]

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178. In *Preserve Our Islands*, the permit applicant had already gone through the GMA permitting process. 133 Wash. App. 503, 510–11, 137 P.3d 31, 35 (2006). Because the GMA and the SMA have environmental preservation as a common goal, forcing private parties to separately conform to both statutes may place a heavier burden on them. The determination of private burdens for the advancement of the public interest is generally a legislative task, rather than a judicial one. This problem speaks to the sometimes blinding complexity of land use law in Washington. A call for reform by way of streamlining the multiple permit processes, in order to provide landowners better assurances of fairness and predictability, is beyond the scope of this Note.

179. Brief of Amici Curiae Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development, *supra* note 114, at 6.

180. *E.g.*, Barrie v. Kitsap County, 93 Wash. 2d 843, 851 n.1, 613 P.2d 1148, 1153 n.1 (1980); Nelson v. City of Seattle, 64 Wash. 2d 862, 866, 395 P.2d 82, 84 (1964); Donwood, Inc. v. Spokane County, 90 Wash. App. 389, 395–96, 957 P.2d 775, 778 (1998).

181. Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 865, 103 P.3d 244, 247 (2004) (quoting City of Spokane v. J-R Distribs., Inc., 90 Wash. 2d 722, 726, 585 P.2d 784, 786 (1974)); *see also* Lauterbach v. City of Centralia, 49 Wash. 2d 550, 554, 304 P.2d 656, 659 (1956). This rule of construction is actually an invocation of a long-standing principle of municipal authority known as Dillon's Rule, which states that

Although the principle addresses power created by statute *or* by the state constitution, the court follows with an analysis questioning only whether the city had statutory authority. The court effectively ignored any argument based on authority granted under the state constitution.[182] It thus failed to consider what amounts to a constitutional fallback and one of the ways in which Dillon's Rule has been broadened in Washington.[183]

The scope of the police power delegated to municipalities under Article XI, section 11 of the Washington Constitution, is as broad as that of the state, as long as the ordinance is (1) local, (2) not in conflict with state law, and (3) reasonable.[184] In *Weden*,[185] the Supreme Court of Washington reiterated a rule that represents a continuation of a long line of cases articulating a willingness to construe municipal police power broadly.[186] Though the issue in *Weden* arose due to county action, the decision can be read to apply to all municipalities enacting ordinances that are subject to the same restraints on the general grant of power. More significantly, *Weden* can be read to hold that all municipalities enacting ordinances can take advantage of the Article XI grant of authority and the accompanying judicial deference accorded municipal acts within that authority. Such deference would accord significant discretion to municipalities to react to changing circumstances with regard to land use planning. As moratoria are tools a municipality would use within that discretion—specifically for the purpose of reacting to changing circumstances—it follows that authority to enact moratoria should be included under the general grant of police power.

In *Biggers*, the city argued that *Weden* should control the outcome before the court of appeals,[187] and did so again in a brief filed with the

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> local governments have those powers expressly conferred by state constitutional provisions, state statutes, and, where applicable, the home rule charter; those powers necessarily or fairly implied in, or incident to, the powers expressly granted; and those powers essential to the declared objects and purposes of the municipality or quasi corporation.

Sebree, *supra* note 56, at 158 (citing O. REYNOLDS, LOCAL GOVERNMENT LAW 139 (1989)). Dillon's rule is named after John F. Dillon, an Iowa Supreme Court justice who believed that municipalities were at greater risk of improper influence by special interests and that limiting municipal power was the proper response to that risk. *Id.*

182. *See* discussion *supra* Part II.A.1.

183. *See* Sebree, *supra* note 56, at 163. Sebree's research indicates that courts may be more willing to broadly construe municipal police power, as opposed to other powers, under Dillon's Rule. *Id.*

184. *See* Weden v. San Juan County, 135 Wash. 2d 678, 692, 958 P.2d 273, 280 (1998).

185. *Id.*

186. *See* discussion of *Weden supra* Part II.A.1 and note 26.

187. Though the respondents argued that the city failed to make this argument, Respondents' Supplemental Brief at 13, Biggers v. City of Bainbridge Island, 124 Wash. App. 858, 103 P.3d 244 (2004) (No. 30752-9-II), 2006 WL 811753, the city clearly did assert it before the court of appeals, City of Bainbridge Island's Opening Brief, *supra* note 3, at 38.

Washington Supreme Court.[188] This argument is both sound and preferable for several reasons. First, it provides a simple doctrinal method of resolving statutory silence on this issue. Second, employing *Weden* preserves a structural system firmly ensconced in Washington law. Finally, it avoids unnecessary judicial meddling with statute blending.[189]

To produce a clean result, the state constitution should ultimately control with regard to this issue. When the court is asked to resolve whether municipalities have authority to enact certain ordinances when the legislature is silent on the particular legislation, the court should uphold the ordinance if it falls within the municipality's delegated Article XI power. The court can determine this by applying the *Weden* three-part test: A municipal ordinance is within the scope of the delegated power as long as the ordinance (1) concerns local subject matter, (2) does not conflict with state law, and (3) is reasonable.[190]

The moratorium at issue clearly meets the first prong of the *Weden* test, as it pertains to local shorelines within the geographic boundaries of the city of Bainbridge Island. The Supreme Court's resolution of this issue, therefore, will turn on the test's other two prongs.

Perhaps the biggest obstacle to the satisfaction of the *Weden* test in this case is the doctrine of preemption, for if the ordinance is preempted by the SMA it is invalid.[191] The court could interpret the SMA as the sole regulatory system for shoreline development permits, preempting any municipal action that would regulate shorelines outside of SMA guidelines. This legal landmine was recognized and addressed by amici in a brief before the Supreme Court.[192]

Invalidity of an ordinance can be determined by field preemption if the state has enacted a statute on the same subject as the ordinance, "leaving no room for concurrent jurisdiction."[193] Field preemption turns on express or necessary implication of intent to preempt the field by the state legislature.[194] If the legislature expresses intent to either occupy the

188. This argument was further developed by Snohomish County. *See* Amicus Curiae Brief of Snohomish County, *supra* note 17, at 6.

189. The legislature has viewed such meddling with disfavor. *See* discussion *supra* Part IV.A.

190. Weden v. San Juan County, 135 Wash. 2d 678, 692, 958 P.2d 273, 280 (1998).

191. Of course, if the court continues to rely on the narrowest construction of municipal power by way of *J-R Distributors*, this application of *Weden* may never materialize. *See* discussion *supra* note 181.

192. Brief of Amici Curiae Washington State Department of Ecology and Washington State Department of Community, Trade and Economic Development, *supra* note 114, at 9.

193. Brown v. City of Yakima, 116 Wash. 2d 556, 559, 807 P.2d 353, 354 (1991) (citing Diamond Parking, Inc. v. City of Seattle, 78 Wash. 2d 778, 781, 479 P.2d 47, 49 (1971)).

194. *Id.* at 560, 807 P.2d at 354 (citing Kennedy v. City of Seattle, 94 Wash. 2d 376, 383–84, 617 P.2d 713, 718 (1980)).

field, or to grant concurrent authority, "there is no room for doubt."[195] In the SMA, the state legislature expressed its intent for concurrent authority.[196] As noted earlier, the formation of the SMA as a cooperative regulatory scheme between the local governments and the Department of Ecology[197] obviates a finding of field preemption.

Invalidity of an ordinance may also arise from conflict preemption if the statute and the ordinance cannot be harmonized.[198] Concurrent jurisdiction between the state and municipality is presumed until a conflict is demonstrated.[199] The test for determining conflict preemption is whether an ordinance forbids that which the statute permits.[200] Again, this is what all the shouting is about in the briefs before the court.

Arguably, the moratorium at issue does not conflict with the laws of the state. The city argued that, because the SMA is silent on the issue of moratoria, the city's enactment is not in conflict with any express provision of the statute.[201] In addition, the express goals of the SMA regarding the development of shoreline master programs mandate a preference for not only the preservation of the natural character of the shoreline[202] but also the protection and *ecology* of the shoreline.[203] To the extent that the moratorium was enacted to alter the shoreline management plan to advance these goals, it also better effectuates—and thus does not conflict with— the SMA. Further, if after study it was revealed that the new shoreline master program would allow for the type of development contemplated by the respondents, the moratorium would only have produced a mere delay in the process, not an abdication or prevention thereof.[204]

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195. *Id.*, 807 P.2d at 354–55 (citing Lenci v. City of Seattle, 63 Wash. 2d 664, 669–70, 388 P.2d 926, 930 (1964)).

196. WASH. REV. CODE § 90.58.050 (2006) ("This chapter establishes a *cooperative* program of shoreline management between local government and the state. Local government shall have the *primary responsibility for initiating the planning required by this chapter and administering the regulatory program* . . . .") (emphasis added).

197. Crooks, *supra* note 50, at 424.

198. *Brown*, 116 Wash. 2d at 559, 807 P.2d at 354 (citing City of Spokane v. J-R Distribs., Inc, 90 Wash. 2d 722, 730, 585 P.2d 784, 788 (1978)).

199. Baker v. Snohomish County Dep't of Planning & Cmty. Dev., 68 Wash. App. 581, 588, 841 P.2d 1321, 1324 (1992).

200. Weden v. San Juan County, 135 Wash. 2d 678, 693, 958 P.2d 273, 280–81 (1998) (quoting City of Bellingham v. Schampera, 57 Wash. 2d 106, 111, 356 P.2d 292, 296 (1960)).

201. City of Bainbridge Island's Supplemental Brief at 5–6, Biggers v. City of Bainbridge Island, 156 Wash. 2d 1005, 132 P.3d 146 (2006) (No. 77150-2), 2006 WL 811752 (distinguishing Lauterbach v. City of Centralia, 49 Wash. 2d 550, 551–53, 304 P.2d 656, 657–58 (1956)).

202. WASH. REV. CODE § 90.58.020(2) (2006).

203. *Id.* § 90.58.020(4) (emphasis added).

204. *See* City of Bainbridge Island's Reply Brief at 10, Biggers v. City of Bainbridge Island, 156 Wash. 2d 1005, 132 P.3d 146 (2006) (No. 77150-2), 2004 WL 3775336.

In rebuttal, the respondents and their amici argue that the moratorium conflicts with the SMA.[205] Because the SMA provides an exception for shoreline armoring and protective bulkheads appurtenant to single family residences, issuance of a permit to build those structures comports with the statute.[206] Thus, the moratorium operates to prevent the issuance of something that would normally be approved under the statute—a conflict is apparent. The city has presented the more persuasive argument. Because the moratorium is but a temporary restraint on development, and because it better effectuates the overriding values within the SMA, municipal authority to issue shoreline permit moratoria does not conflict with the SMA.

The final prong of the *Weden* test is met if the ordinance "bear[s] a reasonable and substantial relation to [the] promotion of the general welfare . . . ."[207] The question of reasonableness under this test is a question of law for which the respondents have the burden of proof.[208] The SMA expresses the goals of preserving the natural character of the shoreline,[209] protecting the resources and ecology of the shoreline,[210] and preventing uncoordinated and piecemeal development of the state's shorelines.[211]

For all practical purposes, it may not matter which way the reasonableness analysis is resolved. The court should reaffirm the majority rule that states municipalities may enact moratoria, outside of express statutory authority, by falling back on their delegated police powers under the state constitution. Put more succinctly, shoreline permit moratoria can be included within the delegated police power and are not in conflict with the SMA, as a matter of law. The Supreme Court's application of *Weden* here would not guarantee that this particular moratorium is valid,

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205. *See, e.g.*, Response Brief, *supra* note 5, at 31–38.

206. *Id.*

207. Weden v. San Juan County, 135 Wash. 2d 678, 692, 958 P.2d 273, 280 (1998) (quoting Covell v. City of Seattle, 127 Wash.2d 874, 878, 905 P.2d 324, 326 (1995)).

208. *Id.* at 693, 958 P.2d at 280. Also, the respondent private landowners argue that by not allowing the permit for the construction of the bulkheads, the city is refusing to enforce standards that protect single-family residences from damage. Response Brief, *supra* note 5, at 37. Interestingly, the homeowners argue this point under the conflict prong, rather than the reasonableness prong. *Id.* Nonetheless, it is arguable that, because the SMA sets minimum allowances for erosion protection on lots containing single-family residences, any local regulation which falls below that standard is both in conflict with the SMA and unreasonable. Ultimately, the presumption of validity of local police power regulations may prove too much for the homeowners to overcome.

209. WASH. REV. CODE § 90.58.020(2) (2006).

210. *Id.* § 90.58.020(4). Recall that the city undertook to change its shoreline management plan in order to make necessary accommodation for salmonid habitat. The protection of fish is certainly the protection of a natural resource, just as the protection of fish habitat is the protection of ecology. Because these goals have been defined in the statute as in the public interest, if a moratorium serves to advance them, it is reasonable under *Weden*.

211. WASH. REV. CODE § 90.58.020 (2006).

but it would avoid certain problems manifest in the lower court's decision.[212] For example, the court of appeals' holding could readily be interpreted to mean the SMA can never allow for local permit moratoria in its current state.

However satisfactory a solution the delegated police power may be to this problem, an alternative concept merits consideration. Ultimately, the complexity of the SMA's procedures for administering shoreline development permits and the role played therein by municipalities lead to the conclusion that a different legal framework, one involving administrative law concepts, is in order.

C. Agency Theory: Chevron to the Rescue

One area addressed at the margins in the *Biggers* dispute, if at all, is the question of what level of judicial deference, if any, is owed to a municipality interpreting a statute.[213] Significant reasons exist to consider giving some deference to a municipality construing a statute it is charged with administering by the legislature. A theory of judicial deference to municipalities would center on another source of power for municipalities in these situations—administrative authority. This theory may be perceived as unconventional under Washington law, and indeed it probably is. However, the concept of deference to agencies' interpretation of statutes they administer is not unknown to Washington law, and it is certainly well-ensconced in administrative law. Borrowing from this concept will assist in crafting this alternative solution to the *Biggers* quandary.

In order to receive any sort of deference as an administrative agency, a municipality would need to be characterized as such. Under Washington's Administrative Procedure Act ("APA"),[214] "agency" is defined as:

> any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or

212. This approach avoids an effective argument by the respondents. The landowners argued that if a court is to hold that the GMA provides moratoria authority to municipalities changing their SMPs, then only those municipalities who plan under the GMA would receive such a grant. Respondents' Supplemental Brief, *supra* note 187, at 10. Because the GMA only applies to certain municipalities based on size, the result would be incongruous. This powerful argument would be nullified if the court were to either apply *Weden* or grant judicial deference to a municipality's interpretation of the SMA.

213. In fact, while the city appealed on the grounds that it had wide-ranging authority under either the Code or the GMA, the city never argued that it had construed the SMA to grant authority to enact the moratorium.

214. WASH. REV. CODE § 34.05 (2006).

> judicial branches, the governor, or the attorney general except to the extent otherwise required by law and any local governmental entity that may request the appointment of an administrative law judge under chapter 42.41 RCW.[215]

A fair reading of the plain text of this provision reveals no mention of municipalities before the word except, suggesting that the drafters may not have wanted to include them within the statute. The APA, however, contains a separate provision excluding certain state entities from its application.[216] Notably, municipalities as a class are not present on the list of excluded entities. Because the legislature did not expressly exclude municipalities, there are definitely instances where municipalities may qualify as agencies. Therefore, it is an open question as to whether a municipality operating within the SMA/GMA could be viewed as an agency.

Inclusion notwithstanding, the APA defines "agency action" as "licensing, the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits."[217] Under the SMA, "local government[s] shall have the primary responsibility for . . . administering the regulatory program."[218] Arguably, this responsibility empowers local government with administrative authority when it is acting pursuant to the SMA. By identifying and categorizing local shorelines, holding hearings, and creating shoreline master plans—all tasks delegated to the local governments under the SMA—the local governments are engaged in "agency action."[219] Thus, while municipalities do not strictly fit within the statutory definition, those administering the SMA are certainly engaged in agency action.

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215. WASH. REV. CODE § 34.05.010(2) (2006).

216. *See id.* § 34.05.030(1)(a)–(c) (excluding from the purview of the Act the state militia, board of clemency and pardons, and department of corrections in certain contexts).

217. *Id.* § 34.05.010(3).

218. *Id.* § 90.58.050 (establishing a "cooperative program of shoreline management between local government and the state"). *But cf.* WASH. REV. CODE § 90.58.300 (2006) ("The department of ecology is designated as the state agency responsible for the program of regulation of the shorelines of the state . . . ."). If the ordinance passed by the city in this case set a rule for shoreline development, rather than simply declared a hold on any permit applications, section 300 would apply. Under the APA, "state agency" is not the relevant term; "agency" is. There is little doubt that the legislature gave Ecology a role to play, but a standard rule of statutory construction dictating that statutes be read together would place section 300 next to section 050 and lead to the conclusion that the legislature has created a "cooperative" administrative scheme here, with two "agencies" operating to effectuate the mandate. In addition, section 300 refers to "shorelines of statewide significance," which is a "category of shorelines determined to be of sufficient importance to give the department more substantial planning authority . . . than . . . for other shorelines under the SMA." Buechel v. State Dep't of Ecology, 125 Wash. 2d 196, 204 n.23, 884 P.2d 910, 916 n.23 (1994).

219. *See* WASH. REV. CODE § 90.58.140 (2006).

The concept that a municipality is an agent of the state is recognized in nine states.[220] While the Washington Supreme Court has never held that a municipality cannot qualify as an agency, a lower court has held that the APA did not apply to a county council's application of a road ordinance to a particular parcel of land, though the court did not provide a reason for refusing to apply the APA.[221] If adopted, the treatment of municipalities as agencies could be sufficiently constrained by deeming them quasi-agencies. Such a rule could specify that when a municipality is charged with administering a particular statute, it operates as a quasi-agency; doctrines of administrative law could then apply to guide judicial review of municipal action in these limited circumstances.

Once the threshold is crossed and municipalities acting under the SMA are treated as agencies for the purpose of review, Washington's version of the APA would then apply. Judicial review of a dispute of this type would be controlled by the APA's provisions,[222] and the burden of proving invalidity would fall on the challenger.[223] To take this theory to its apex, the court could apply the judicial deference rule of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[224] The *Chevron* rule, while not perfectly applicable in this situation,[225] could nonetheless be used to solve the problem presented by *Biggers*.

The underlying theory of *Chevron* deference would not prevent application to state agencies. *Chevron* deference is given to agencies by courts because Congress has granted them authority, through an enabling act, to administer some matters over which their particular expertise could be brought to bear.[226] Agencies are given deference because it is presumed that some measure of added competence or expertise is present

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220. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 2.08.10 (3rd ed. 1999) ("[A municipal corporation] is variously described as an arm of the state, a miniature state, an instrumentality of the state, an *agency* of the state . . . .") (emphasis added) (citations omitted).

221. Chaussee v. Snohomish County Council, 38 Wash. App. 630, 636–37, 689 P.2d 1084, 1091 (1984) (stating that the APA did not apply because a county council was not a state agency); *see also* Plumbers & Steamfitters Union Local No. 598 v. Wash. Pub. Power Sys., 44 Wash. App. 906, 910–11, 724 P.2d 1030, 1033–34 (1986) (holding that WPPS was a municipal corporation, not a state agency, under the APA). While the WPPS holding may appear to conflict with *Chaussee*, the cooperative arrangement between the local governments and the state agency in the SMA are in fact distinguishable from that involving a municipal power company.

222. WASH. REV. CODE § 34.05.570 (2006).

223. *Id.* § 34.05.570(1)(a); Superior Asphalt & Concrete Co. v. Dep't of Labor & Indus., 84 Wash. App. 401, 405, 929 P.2d 1120, 1122 (1996) (holding that an administrative agency may adopt a regulation that effectively modifies or amends a statute and that the party seeking to overturn the regulation bears the burden of proof).

224. 467 U.S. 837, 842–43 (1984).

225. The roadblock to applying *Chevron* deference in this situation is clear: *Chevron* applies only to federal agencies.

226. *See* Sebastian v. State, Dep't of Labor and Indus., 142 Wash. 2d 280, 291–94, 12 P.3d 594, 599–601 (Talmadge, J., dissenting) (citations omitted).

within the agency, more so than the general legislative body.[227] Similarly, local governments charged with administering statewide programs for their specific jurisdiction are in a position of greater knowledge about their jurisdiction. The rule effectively works to give agencies the benefit of the doubt on discretionary matters when Congress has been silent on a particular issue.

Biggers presents a logical corollary. Under the SMA, the state legislature, recognizing the importance of local government expertise with regard to the shorelines within their jurisdiction, created this cooperative program vesting authority in the municipalities for the administration of the permit program. Moreover, the creation of the SMA began with a rejection of an approach that would have placed all the authority within Ecology.[228] Taken together, these facts support a conclusion that the legislature intended to give local governments some discretion over local regulation of shorelines.

Should the court decide to approach the case using this method, it could apply the basic framework of *Chevron* to this case, which would raise two questions. First, has the legislature spoken directly to the issue? Second, is the municipality's construction of the statute permissible?[229] The threshold question is easily answered: No express language exists in the SMA pertaining to moratoria—the word "moratorium" does not even appear.

The question of permissible construction is arguably answered in the affirmative in *Biggers*. Given the importance of moratoria in the planning process,[230] the recognition of authority in other statutes by which the municipality is bound, and the express grant of authority to administer the permit program under the SMA, an interpretation by the local government that it also had the power to place a hold on the permit procedure is permissible under the SMA.[231]

V. CONCLUSION

Municipalities should have consistent, congruent authority to enact permit moratoria under the SMA. If the Washington Supreme

227. *See Chevron*, 467 U.S. at 865.

228. Crooks, *supra* note 50, at 424.

229. *See Chevron*, 467 U.S. at 842–43.

230. *See* discussion *supra* Part II.B.1 and accompanying footnotes.

231. WASH. REV. CODE § 90.58.140(3) (2006) ("The local government shall establish a program, consistent with rules adopted by the department, for the administration and enforcement of the permit system provided in this section. The administration of the system so established shall be performed exclusively by the local government.").

Court is not willing to conclude as much, the legislature should amend the SMA and correct its oversight from 1992. The traditional justifications for moratoria power as part and parcel of planning authority—increased public input, improved empirical data, more carefully tailored plans, and the prevention of piecemeal development—apply no less strongly to planning to preserve one of the states most vital and fragile resources, its shorelines.

Further, the risks of withholding a shoreline permit moratoria power—poorly drafted and unclear master plans, overly restrictive measures potentially leading to takings claims, shorter comment periods, and piecemeal development as a result of vested rights—are imminent. Municipalities must possess this power in order to prevent these risks from materializing.